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# The Judge as a Procedural Decision-Maker

## Addressing the Disconnect Between Legal Psychology and Legal Practice

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### Abstract

Despite the abundance of studies exposing heuristic and biased thinking in judicial decision-making the influence of this empirical work in court is limited. In this commentary, we address this paradox and argue that the disconnect between empirical work and practice stems from the limited knowledge and consideration of procedural rules. These shortcomings increase the skepticism of legal scholars and practitioners of this research and give an excuse for dismissing the findings, deeming them inapplicable in court. We suggest that the only way forward is by diversifying our research methods and by building a culture of collaboration, fostering research partnerships between legal scholars and (legal) decision-making researchers. This approach aims to bridge the gap between legal and social sciences and to promote the impact of empirical studies of the legal system on current legal practice.

**Keywords:** judicial decision-making, cognitive bias, legal psychology, empirical legal studies

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## Introduction

The years following the seminal work of Tversky and Kahneman (1974) on bounded rationality, saw an upsurge in studies exposing heuristic and biased thinking in judicial decision-making (see Rachlinski & Wistrich, 2017). Knowledge about the fact that judicial judgment is not and cannot be fully rational, and that heuristics and biases influence judicial decision-making, can slowly but surely be counted as general knowledge of lawyers (Carson, Milne, Pakes, Shalev, & Shawyer, 2007; Keulen & Knigge, 2016). Yet the influence of this empirical work in day-to-day court decisions is limited. With the possible exception of sentencing decisions in England and Wales (i.e., adaptation of sentencing guidelines on the basis of cognitive psychology findings; Dhami, Belton & Goodman-Delahunty, 2015), and the changes in the application of juvenile criminal law from 18 years of age to early 20's in the Netherlands and Germany, the results from legal psychological experiments in decision making rarely change the working mechanism of the criminal justice system. The legal reforms concerning judicial and prosecutorial decision-making are disproportional to the amount of empirical studies calling for a change.

In this commentary, we address this paradox and argue that the disconnect between empirical work and practice stems primarily from the limited consideration of procedural rules in the empirical studies. These shortcomings increase the skepticism of legal

scholars and practitioners of this research and give an excuse for dismissing the findings, deeming them inapplicable in court settings.

## The judge as a *procedural* decision-maker

While everyday judgment is usually free of form, national criminal procedural law forces the court to observe certain formal rules before, during and after trial. Therefore, judicial decision-making is an interplay between *human* judgment (and all heuristics and biases that may apply) and *procedural* frameworks. It is this interaction between procedural law and human judgment that is characteristic of judicial decision-making (for similar approach see work of Sunstein, Thaler and Balz (2013) on choice architecture). However, the majority of experimental studies on judicial decisions address the human aspect in a vacuum, stripped from its procedural context. While this approach regularly yields interesting findings (for brief overview see Peer & Gamliel, 2013), it leaves unexposed that judges do not take a form-free decision. Dutch judges, for example, are dependent on the prosecutor because they can only judge on the charges formulated in the indictment. The criteria by which these charges can be considered proven are also embedded in a strict procedural framework, known as the law of evidence. The judge can convict a suspect only when certain rules have been complied with, such as the requirement of corroboration (*unus testis, nullus testis*). Procedural rules govern judicial

fact-finding and decision-making, and this holds true for all legal systems.

Research today has done little to address the impact of procedural rules on judicial decisions. For example, most studies on anchoring bias vary either the size of the anchor or its presence (e.g., Guthrie, Rachlinski & Wistrich, 2001; McAuliff & Bornstein, 2010). However, the court cannot be anchor free when discussing sentencing or litigation cases. For a criminal procedure (in continental Europe), the Criminal Procedural Law requires that the prosecutor makes a sentencing suggestion, in line with the sentence directions of the national Criminal Code. In response, the defense can ask *inter alia* for another modality (community services instead of imprisonment), a lower sentence or probation. Experiments aimed to manipulate procedural rules governing these anchors should consider anchor updating or the time interval between the anchors and the ruling. This is an essential substantive shortcoming and a strong point of criticism by legal professionals who argue that legal strategies and rules can help legal decision makers reduce their bounded rationality (i.e., “debiasing through law”; Jolls & Sunstein, 2005). Indeed, recent studies suggest that procedural rules can act as debiasing techniques (Pina-Sanchez & Linacre, 2014). Yet, the dearth of research on the effectiveness of procedural rules as debiasing techniques bolsters the belief in normative legal decision models and may serve as an excuse for legal professionals not to

appreciate the significance of the scientific findings. Interestingly, the nomothetic perspective of most psychological studies may further reinforce the depreciation of scientific findings. Most studies rely on aggregated group data which opens the window to the relativist fallacy (i.e., belief that something is true for the average person but not for one’s self) and to bias blind spot (i.e., failing to see the impact of bias on one own judgment; Pronin, Lin, & Ross, 2002).

The omission of procedural rules can also be seen as a *methodological* shortcoming. The design of many studies on judicial decision-making overlooks the court’s bureaucratic setting and the constraint of legal precedent (Vidmar, 2011). It is set solely in view of psychological theories; not of legal proceedings and therefore fails to account for structural aspects of decision making in criminal law. For instance, a direct question about a suspect’s guilt (e.g., Eerland & Rassin, 2012; Englich et al. 2005), in probabilistic or dichotomous format, might reveal that a piece of evidence can impact a legal decision, but does not capture the true legal issue, which is the presence of reasonable doubt. This may sound as a formality issue. However, research on the framing effect suggests that semantics are pivotal for decisions under uncertainty (Belton, Thomson & Dhami, 2014; Englich, & Mussweiler, 2001; Tversky & Kahneman, 1981). Additionally, such findings say little about the mechanism behind the decision. Likewise, researchers only recently started to consider that evidence interact and are

weighted in combination with each other (e.g., Lewisch, Mischkowski, & Glöckner, 2016; Kukucka & Kassin, 2014) and are yet to address (but see Lagnado & Harvey, 2008) that the presentation order is structured: prosecutor before defence to maintain the rule that the state must prove the guilt of the suspect (as part of the presumption of innocence). Therefore, experiments that do not consider procedural order are seen as having little to no meaning for judicial decision-making in practice because they deviated from the procedural framework.

Although legal psychologists are aware of some of the problems surrounding those structural aspects – using research material is considered realistic, or prefer judicial experts as subjects (*i.e.*, Englich et al. 2005, De Keijser & Van Koppen 2007) –, they appear not sensitive to the fact that judicial decision-making is strictly regulated. In fairness, there are good reasons why researches strive for simplicity in their designs including the need to properly isolate independent variables, the difficulty in recreating “authentic” legal contexts, and concerns about the generalizability of the findings beyond specific jurisdictions. In fact, accounting for the strict legal regulations can even be seen as a detriment rather than an advantage, because criminal justice systems vary greatly across countries (Konečni & Ebbesen 1979; Schuller & Ogloff 2001). Nevertheless, we are of the opinion that it is better to produce studies that are directly applicable to some jurisdiction than to none.

Hence, we argue that the current field of legal psychology can be categorized as psychology *and* law or psychology *in* law, but not psychology *of* law. To do so, legal, psychological researchers should “tinker” procedural rules to learn more about judicial decision-making: accept the procedure on a macro-level and tinker with procedural rules on a micro-level. This approach is not without its challenges as researchers need to juggle internal validity and procedural/structural aspects in their designs. Notwithstanding the challenges, we believe that this approach can transform research on legal decision making.

#### Way Forward

The methodological constraints and the increased skepticism of experimental results put the progress of decision-making in the courtroom at a halt and frustrate legal experts and decision-making researchers alike. The only way forward is by building a culture of collaboration and trust, fostering research partnerships between legal scholars and (legal) decision-making researchers. Organizing common conferences, round tables and think tanks for legal experts and legal psychologists is a good start. Legal scholars could inform researchers about problems in practice and advise them on how to best incorporate the procedural framework in their methods. At the same time, legal scholars, lawyers, and judges need to open up to the idea that many of the limitations of human cognition are universal and independent of training or experience

(Danziger, Levav, & Avnaim-Pesso, 2011; Thomas, & Lawrence, 2018). Importantly, they need to open the door to their chambers to researchers and facilitate *in vivo* research. Through their active involvement, they can assist the researchers' efforts in improving court decision-making. Likewise, decision-making experts should diversify their research methods. They should strive to design studies that make use of real judicial data wherever possible and consider using "representative design" (Dhami, & Belton, 2017; Dhami, Hertwig, & Hoffrage, 2004) to address some of the methodological concerns raised by legal scholars. We feel strongly that this collaborative approach will serve to enrich and refine existing legal models of judicial decision-making and contribute both in psychological research and the legal system.

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